



Attorney's Docket No.: 06129-156001

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Kevin H. Gillespie
Serial No. : 09/458,415
Filed : December 10, 1999
Title : SHOE OUTSOLE

Art Unit : 3728
Examiner : Anthony D. Stashick

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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SUPPLEMENTAL APPEAL BRIEF

Appellant submits this supplemental appeal brief in response to the office action of June 15, 2004 (the "Office Action"). In that office action, the Examiner's final rejection dated April 23, 2002 was withdrawn and replaced by a nonfinal rejection on a new combination of references. Applicant maintains that the pending claims are patentable and wishes to proceed directly to appeal.

In the Office Action, the Examiner objects to the drawings due to a minor error in Fig. 3 of the formal drawings. This objection will be addressed in a separate paper.

(1) Real Party in Interest

The patent application is assigned to SRL, Inc. by virtue of an assignment by the inventor, Kevin H. Gillespie to SRL, Inc.

(2) Related Appeals and Interferences

There are no related pending appeals or interferences.

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I hereby certify under 37 CFR §1.8(a) that this correspondence is being deposited with the United States Postal Service as first class mail with sufficient postage on the date indicated below and is addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

September 14, 2004
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Darlene J. Morin
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(3) Status of Claims

Claims 1-8 and 47-76 are in the case.

In a Non-Final Office action mailed June 15, 2004:

Claims 1 and 4-7 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Tomat (U.S. 6,092,251) in view of Official Notice.

Claims 2 and 3 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Tomat in view of Official Notice and further in view of Patterson et al. (U.S. 6,176,025).

Claim 8 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Tomat in view of Official Notice and further in view of Lennihan, Jr. (U.S. 5,875,568).

Claims 47, 49-59, 61-65 and 67-73 have also been rejected under 35 U.S.C. § 103(a) as being unpatentable over Tomat in view of Official Notice and further in view of Turner (U.S. Des. 417,946).

Claims 60, 66, 74 and 75 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Tomat in view of Official Notice and Turner, and further in view Lennihan, Jr.

Claim 48 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Tomat in view of Official Notice and Turner, and further in view of Lennihan, Jr.

Claim 76 has been rejected under 35 U.S.C. § 103(a) as being obvious over Tomat in view of Official Notice.

(4) Status of Amendments

All amendments have been entered.

(5) Summary of Invention

The invention features a shoe outsole for a baby shoe particularly suited to facilitate walking of a first walker by mimicking the barefoot gait of the first walker through the maximization of shoe flexibility. The shoe outsole includes an outer member having an inner heel region and an inner member located in the inner heel region that includes a ground-contacting surface. The inner member has a softer durometer than the outer member, and the shoe outsole is dimensioned for use in a baby shoe where the inner member is positioned and

dimensioned to fit under a baby's heel during use of the baby shoe. These features, among others, aid in the development of first walkers by attempting to meet two objectives: (1) mimicking the barefoot walking characteristics of a first walker, and (2) aiding the stability of the first walker, rather than destabilizing the baby's gait.

In some implementations, featured in claims 5-7, 47 and 76, the shoe outsole further includes an intermediate member, located in an intermediate region of the outer member and having a softer durometer than the outer member. The intermediate member may include a plurality of ridges, as recited in claim 47.

In other implementations, the shoe outsole further includes grooves in the upper forefoot region, i.e., grooves in the upper surface of the outsole that faces the user's foot when the shoe is worn (claims 48-59). These grooves are provided to improve the flexibility of the shoe, an important consideration in a baby shoe.

(6) Issues

(A) Is the subject matter of claims 1 and 4-7 obvious under 35 U.S.C. §103(a) over Tomat (U.S. 6,092,251) in view of Official Notice?

(B) Is the subject matter of claims 2 and 3 obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and further in view of Patterson (U.S. 6,176,025)?

(C) Is the subject matter of claim 8 obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and further in view of Lennihan, Jr. (U.S. 5,875,568)?

(D) Is the subject matter of claims 47, 49-59, 61-65 and 67-73 obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and further in view of Turner (U.S. Des. 417,946)?

(E) Is the subject matter of claims 60, 66, 74 and 75 obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and Turner and further in view Lennihan, Jr?

(F) Is the subject matter of claim 48 obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and Turner and further in view of Lennihan, Jr.?

(G) Is the subject matter of claim 76 obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice?

(7) Grouping of Claims

The claims do not stand or fall together.

The following groups of claims, where a ground of rejection applies to more than one claim in the group, stand or fall together:

- I. Claims 1-4, 8, and 60-75 stand or fall together;
- II. Claims 5-7, 47 and 76 stand or fall together; and
- III. Claims 48-59 stand or fall together.

(8) Argument

The Applicant will explain why the rejections should be reversed.

A. Claims 1 and 4-7 are not obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice

Applicant's claims recite a shoe outsole for a baby shoe, i.e., a shoe outsole that is dimensioned for use in a baby shoe.

Tomat does not teach or suggest a baby shoe or an outsole for such a shoe. Instead, Tomat is directed solely to methods of manufacturing shoes. As discussed in paragraph 11 of the Declaration of David Thorpe (submitted herewith), it is clear that the Tomat shoes are adult shoes because of the relatively thick, inflexible outsole and the required bulky insole 12, which would not be suitable for use in a baby shoe. Referring to Tomat column 1, lines 37-39, column 2, line 60 and Fig. 7, it is clear that the shoes disclosed are provided for a wearer comfortable with walking in shoes (i.e., not a baby). Tomat states, "Another important object is to provide a vulcanization method of producing shoes of low weight and highly comfortable for the user *while walking*."

In an attempt to remedy this deficiency of Tomat, the Examiner takes Official Notice that "shoes, as well as the shoe soles, have been made of different sizes to fit people with different sized feet."

While Applicant does not dispute that shoes and shoe soles are made in different sizes, this fact, even if properly combinable with Tomat, would not have rendered the claimed invention obvious. The difference between baby shoes and adult shoes is not simply a difference

of size, but a difference of kind. Baby shoes have performance characteristics different from those of adult shoes, and are designed to address different problems. For instance, as will be discussed in further detail below, because they are just learning to walk, babies have a gait that is different from an adult gait. Babies do not have the balance, proprioception and motor skills that are possessed by adult walkers, and thus need a shoe that addresses these problems. On the other hand, babies weigh only a fraction of the weight of an adult walker, and walk only a few steps at a time, and thus a baby shoe does not need to be designed to accommodate the needs of an adult walker. As a result, it would not have been obvious to the artisan to incorporate the features of an adult shoe in a baby shoe.

Moreover, Applicant notes that MPEP 2144.03 strongly cautions against the indiscriminate use of Official Notice. Official Notice “should be judiciously applied” and should “*serve only to ‘fill in the gaps’ in an insubstantial manner* which might exist in the evidentiary showing made by the examiner to support a particular ground for rejection.” Importantly, the MPEP unequivocally states that “*it is never appropriate to rely solely on common knowledge in the art ... as the principal evidence upon which a rejection is based.*” (MPEP 2144.03, Section E, emphasis added.) Here, the Examiner is not using Official Notice to fill in an insubstantial gap – on the contrary, the Examiner is using Official Notice as the principal evidence to refute Applicant’s arguments for patentability. Such use is improper.

Additionally, as explained in Applicant’s previous Appeal Brief, claims 5-7 (group II) are not obvious over Tomat in view of Official Notice because Tomat does not teach or suggest the combination of an inner member and an intermediate member, as claimed. For the sake of brevity, Applicant’s arguments in support of claims 5-7 will not be reiterated here, but can be found in full in the previous Appeal Brief.

As discussed above, Applicant’s claims are not obvious over Tomat in view of Official Notice and Applicant respectfully requests that this rejection be reversed.

B. Claims 2 and 3 are not obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and further in view of Patterson

Applicant respectfully requests that dependent claims 2 and 3 be reconsidered and the rejection be reversed in light of the above arguments. Patterson, cited for its teaching of a

bladder-like cushion in the heel of an outsole, does not supply that which is lacking in Tomat. For example, Patterson does not teach or suggest a baby's shoe or an outsole for such a shoe, nor does Patterson teach or suggest the combination of an inner member and an intermediate member. Instead, Patterson relates to specialized shoes for use in playing golf, a game that is unpopular with babies as a rule.

C. Claim 8 is not obvious under 35 U.S.C. § 103(a) as being unpatentable over Tomat in view of Official Notice and further in view of Lennihan, Jr.

Applicant respectfully requests that dependent claim 8 be reconsidered and the rejection be reversed in light of the above arguments. Lennihan, cited for its teaching of a shoe having a back wall with a rounded contour, does not supply that which is lacking in Tomat. For example, Lennihan does not teach or suggest a baby's shoe or an outsole for such a shoe, nor does Lennihan teach or suggest the combination of an inner member and an intermediate member. Instead, Lennihan describes running shoes.

D. Claims 47, 49-59, 61-65 and 67-73 are not obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and further in view of Turner

As noted above, Applicant's claims recite a shoe outsole for a baby shoe. Applicant's claims further require that the softer durometer inner member be positioned and dimensioned to fit under a baby's heel during use of the baby shoe. In contrast, both Tomat and Turner are directed solely to adult shoes. This distinction is a significant one, and involves the structural characteristics of the outsole. As discussed above, while it is indeed well known that shoes and shoe soles come in different sizes, this would not in any way have suggested to the artisan to structurally modify the shoes described by Tomat and Turner so as to render these shoes suitable for use by a baby.

After a study of the gaits of babies who are learning to walk, conducted by the assignee (Stride Rite) and Connecticut Children's Medical Center (CCMC), Applicant discovered that providing the claimed inner member allows babies to comfortably roll from heel to toe in a correct walking gait. The relatively soft inner member also tends to reduce the wobbling that many babies exhibit when walking in conventional relatively stiff-soled baby shoes. The Stride

Rite research and development project that utilized the gait information obtained from the CCMC gait study is discussed in the Declaration of David Thorpe, paragraphs 4-10.

The gait study confirmed that gaits of first walkers (babies learning to walk) are different from those of experienced, adult walkers, and raise different concerns. For example, walking barefoot was generally easier for first walkers than walking in the shoes that were tested. These shoes tended to cause the babies to wobble. The study also showed that a baby's foot naturally rolls from heel to toe in a proper gait, whereas the shoes that were tested introduced improper side-to-side motion. The gait study also determined the profile of pressure exerted on the sole of a baby's foot during walking, which allowed Stride Rite to identify areas of relatively higher pressure. (Declaration of David Thorpe, paragraph 5.)

Based on the information obtained from the gait study, Stride Rite identified two key objectives for its work in developing a new baby shoe. Stride Rite wanted to develop a baby shoe that would (1) successfully mimic the barefoot walking characteristics of a first walker, and (2) aid the stability of the first walker, rather than destabilizing the baby's gait. The Stride Rite Natural Motion System products (baby shoes which embody the claimed invention) were developed to meet these objectives. (Declaration of David Thorpe, paragraph 6.)

These objectives are not fundamental in the design of adult footwear. The mimicking of barefoot walking is essential to a first walker -- the closer a shoe comes to achieving this goal, the easier the child will adapt to walking in footwear. Stability is also crucial, as a first walker adapting to footwear still has to master the art of balance. In contrast, an adult walker is already adept at walking, and has adapted to wearing shoes and perfected his or her balance. (Declaration of David Thorpe, paragraph 10.)

None of the cited references teaches or fairly suggests a shoe outsole for a baby shoe. Instead, each of the references is directed to a shoe designed for use by adults.

As discussed in the Declaration of Dr. Edward Mostone, submitted herewith, there are significant differences between infant feet and adult feet.

Infant feet are not simply smaller versions of adult feet. For instance, an infant's foot is hyper-mobile, and has little or no arch, due to "baby fat." Moreover, the bones of an infant are very soft. Some bones do not even appear on an x-ray of an infant's foot, because ossification has not yet occurred. As a result, the bone structure of an infant's foot is moldable until the child

is at least 4-6 years old. These characteristics do not occur in most normal adult feet.

(Declaration of Dr. Edward Mostone, paragraph 2.)

The gait of an infant is also different from that of an adult. Infants tend to waddle, with their toes directed outward in a "duck walk." A normal, adult gait is generally not achieved until the child is 6 to 8 years old. Infants also have great difficulty balancing on two feet -- as a result many infants tend to walk with their arms raised, in an effort to balance. Improper footwear can exacerbate these problems. Most normal adults do not suffer from these problems. (Declaration of Dr. Edward Mostone, paragraph 3.)

As discussed in the Declaration of David Thorpe, each of the cited references describes a shoe that is designed for adult use and would not be suitable for a first walker. The Tomat shoe does not have the flexibility required for a baby shoe. Instead, the Tomat shoe has a relatively thick, inflexible outsole, and Tomat requires the use of a bulky insole 12 (see col. 2, line 61 and Fig. 7). The other shoes described in the references include studded soles, footbeds and thick rounded soles that would not be suitable for use in a baby shoe. (Declaration of David Thorpe, paragraph 11.)

Moreover, Turner shows a sole for footwear and, as a design patent, provides no description as to the type of shoe with which the sole would be used. Patterson describes a golf shoe and Lennihan describes a running shoe, shoe types that clearly are not intended for use by babies. Thus, none of the cited references recognize the benefit of including, in a baby shoe, a relatively soft inner member positioned and dimensioned to fit under the baby's heel.

Furthermore, independent claim 47 (group II), recites, "an inner member, located in an inner heel region of the shoe outsole; and an intermediate member located in an intermediate region of the shoe outsole, between the outer member and the inner member." As noted above with respect to claims 5-7, Tomat fails to disclose an intermediate member between the outer member and the inner member. Tomat merely teaches inserts 11 that may comprise a one-piece member. Similarly, Turner fails to disclose an intermediate region disposed between inner and outer members. Turner merely illustrates a single-member sole. Because Turner fails to overcome the deficiencies noted above with respect to Tomat, Applicant respectfully requests this rejection be reversed.

Additionally, claims 49-59 (group III) require that the shoe outsole include a plurality of parallel grooves defined in the upper forefoot region," a feature that is neither taught nor fairly suggested by Tomat or Turner. Referring to Fig. 1 of Applicant's specification, upper surface 20 includes upper forefoot region 24. In Applicant's outsole, grooves 26 may be included in upper forefoot region 24 to provide additional flexibility. (See page 3, lines 26-27, of Applicant's specification). Referring to Figs. 1-7 of Tomat, it is clear that Tomat fails to disclose the use of grooves in an upper forefoot region. Instead, the upper forefoot region is smooth, as can be seen in Fig. 7 of Tomat. Similarly, Turner discloses a smooth upper forefoot region. (See Fig. 5 of Turner.)

Applicant respectfully requests that the rejection of claims 49-59, 61-65 and 67-73, which are dependent on claim 1, be reconsidered in light of the arguments set forth with regard to claim 1, above, and the rejection be reversed.

E. Claims 60, 66, 74 and 75 are not obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and Turner and further in view Lennihan, Jr

Applicant respectfully requests that dependent claims 60, 66, 74 and 75, which are dependent on claim 1, be reconsidered and the rejection be reversed in light of the above arguments. As discussed above, there is no suggestion in any of the cited references of a baby shoe or an outsole for a baby shoe, nor is there teaching or suggestion of the combination of an inner member and an intermediate member.

F. Claim 48 is not obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice and Turner and further in view of Lennihan, Jr

As discussed above with respect to part D, Applicant's claims, recite a shoe outsole for a baby shoe, while all of the cited references are directed to adult shoes.

Additionally, neither Tomat, Turner, nor Lennihan, Jr. disclose "a plurality of substantially parallel grooves defined in the upper forefoot region." As discussed above in section D, neither Tomat nor Turner teaches or fairly suggests this feature. Likewise, Lennihan fails to teach or disclose any ridges in the upper surface of the outsole. For at least this reason, Applicants request this rejection be reversed.

Applicant : Kevin H. Gillespie
Serial No. : 09/458,415
Filed : December 10, 1999
Page : 10 of 14

Attorney's Docket No.: 06129-156001

G. Claim 76 is not obvious under 35 U.S.C. § 103(a) over Tomat in view of Official Notice

Claim 76 recites, "The shoe outsole of claim 1 wherein the ground contacting surface further includes an intermediate member, between the inner member and the outer member, having a softer durometer than the outer member, the durometer of the inner member being softer than the durometer of the intermediate member." As discussed above with respect to claims 5-7 and 47, Tomat fails to disclose an intermediate member between the outer member and the inner member. Tomat merely teaches inserts 11 that may comprise a one-piece member. Applicant respectfully requests reconsideration in light of the arguments set forth in this part and with respect to claim 1, above.

Applicant submits that this application is now in condition for allowance. Early favorable action is respectfully requested. A check for \$320.00 is also enclosed for payment of the required brief fee. Please apply any other charges or credits to Deposit Account No. 06-1050, referencing Attorney Docket No. 06129-156001.

Respectfully submitted,

Date: Sept. 14, 2004

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Appendix of Claims

- 1. (Amended) A shoe outsole for a baby shoe, comprising:
an outer member including an inner heel region; and
an inner member located in the inner heel region and including a ground contacting surface, the inner member having a softer durometer than the outer member;
the shoe outsole being dimensioned for use in a baby shoe, and the inner member being positioned and dimensioned to fit under a baby's heel during use of the baby shoe.
2. The shoe outsole of claim 1 wherein the inner member contains a liquid.
3. The shoe outsole of claim 1 wherein the inner member contains a gas.
4. (Amended) The shoe outsole of claim 1 wherein the inner member extends to within about 2 mm of a back edge of the outer member.
5. The shoe outsole of claim 1 wherein the outer member includes an intermediate region, an intermediate member being located in the intermediate region and having a softer durometer than the outer member.
6. (Amended) The shoe outsole of claim 5 wherein the intermediate member extends to within about 1.5 mm of a front edge of the outer member.
7. (Amended) The shoe outsole of claim 5 wherein the intermediate member extends to within about 2 mm of a back edge of the outer member.
8. The shoe outsole of claim 1 wherein the outer member includes a back wall having a rounded contour extending smoothly between a horizontal plane and a vertical plane.
47. (Amended) A shoe outsole for a baby shoe, comprising:
an outer member;
an inner member, located in an inner heel region of the shoe outsole; and
an intermediate member located in an intermediate region of the shoe outsole, between the outer member and the inner member,
the intermediate member having a softer durometer than the outer member, and including a plurality of ridges, and
the inner member including a ground contacting surface, and having a softer durometer than the outer member;

the shoe outsole being dimensioned for use in a baby shoe, and the inner member being positioned and dimensioned to fit under a baby's heel during use of the baby shoe.

48. (Amended) A shoe outsole for a baby shoe, comprising:

an outer member including, a lower forefoot region, an opposite upper forefoot region, and a back wall, the back wall having a rounded contour extending smoothly between a horizontal plane and a vertical plane;

an inner member located in an inner heel region of the shoe outsole, and including a ground contacting surface, the inner member having a softer durometer than the outer member;

a plurality of substantially parallel grooves defined in the lower forefoot region, at least one of the plurality of grooves extending toward a front edge of the shoe outsole beyond a ground engaging portion of the lower forefoot region when flat footed;

a plurality of substantially parallel ridges included in the lower forefoot region, at least some of the ridges being interdigitated with the grooves in the lower forefoot region; and

a plurality of substantially parallel grooves defined in the upper forefoot region;

the shoe outsole being dimensioned for use in a baby shoe, and the inner member being positioned and dimensioned to fit under a baby's heel during use of the baby shoe.

49. The shoe outsole of claim 1 wherein the outer member includes a lower forefoot region, and an upper surface including an opposite, upper forefoot region, there being a plurality of grooves defined in the lower forefoot region and a plurality of grooves defined in the upper forefoot region.

50. The shoe outsole of claim 49 wherein the grooves in the lower forefoot region are substantially parallel.

51. The shoe outsole of claim 49 wherein the grooves in the upper forefoot region are substantially parallel.

52. The shoe outsole of claim 49 wherein the grooves in the lower forefoot region are generally transverse to a longitudinal axis of the shoe outsole.

53. The shoe outsole of claim 52 wherein the grooves in the lower forefoot region are substantially perpendicular to the longitudinal axis of the shoe outsole.

54. The shoe outsole of claim 49 wherein the grooves in the upper forefoot region are generally transverse to a longitudinal axis of the shoe outsole.

55. The shoe outsole of claim 54 wherein the grooves in the upper forefoot region are substantially perpendicular to the longitudinal axis of the shoe outsole.

56. The shoe outsole of claim 49 wherein at least some of the grooves in the lower forefoot region extend to both side edges of the shoe outsole.

57. The shoe outsole of claim 49 wherein the grooves in the lower forefoot region extend toward a front edge of the shoe outsole beyond a ground engaging portion of the lower forefoot region when flat footed.

58. The shoe outsole of claim 49 wherein the lower forefoot region includes a plurality of ridges.

59. The shoe outsole of claim 58 wherein at least some of the ridges are interdigitated with the grooves in the lower forefoot region.

60. (Amended) The shoe outsole of claim 49 wherein the outer member includes a back wall having a rounded contour extending smoothly between a horizontal plane and a vertical plane.

61. The shoe outsole of claim 1 wherein the outer member has a ground contacting surface including a toe region, there being a plurality of grooves defined in the toe region, at least one of the grooves extending toward a front edge of the shoe outsole beyond a ground engaging portion of the toe region when flat footed.

62. The shoe outsole of claim 61 wherein the grooves are substantially parallel.

63. The shoe outsole of claim 61 wherein the grooves extend toward side edges of the shoe outsole.

64. The shoe outsole of claim 61 wherein the grooves are generally transverse to a longitudinal axis of the shoe outsole.

65. The shoe outsole of claim 64 wherein the grooves are substantially perpendicular to the longitudinal axis of the shoe outsole.

66. (Amended) The shoe outsole of claim 61 wherein the outer member includes a back wall having a rounded contour extending smoothly between a horizontal plane and a vertical plane.

67. The shoe outsole of claim 1 wherein the outer member includes a forefoot region, there being a plurality of substantially parallel grooves located in the forefoot region, and a

plurality of substantially parallel ridges, at least some of the ridges being interdigitated with the grooves.

68. The shoe outsole of claim 67 wherein the ridges are located at ground contacting regions of the forefoot region.

69. The shoe outsole of claim 67 wherein the grooves and the ridges are substantially parallel to each other.

70. The shoe outsole of claim 67 wherein the grooves are generally transverse to a longitudinal axis of the shoe outsole.

71. The shoe outsole of claim 70 wherein the grooves are substantially perpendicular to the longitudinal axis of the shoe outsole.

72. The shoe outsole of claim 67 wherein the ridges are generally transverse to a longitudinal axis of the shoe outsole.

73. The shoe outsole of claim 72 wherein the ridges are substantially perpendicular to the longitudinal axis of the shoe outsole.

74. (Amended) The shoe outsole of claim 67 wherein the outer member includes a back wall having a rounded contour extending smoothly between a horizontal plane and a vertical plane.

75. The shoe outsole of claim 1 wherein the outer member has a ground contacting surface, an upper surface, and a side wall joining the ground contacting surface and the upper surface, the side wall including a back wall having a rounded contour extending smoothly between a horizontal plane and a vertical plane.

76. (Amended) The shoe outsole of claim 1 wherein the ground contacting surface further includes an intermediate member, between the inner member and the outer member, having a softer durometer than the outer member, the durometer of the inner member being softer than the durometer of the intermediate member.--